Supreme Court, U.S.
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NO.

IN THE

Supreme Court of the United States

SAMANTHA J. COMFORT, ON BEHALF OF
HER MINOR CHILD ELIZABETH NEUMYER, ET AL.,

Petitioners,

v.

THE LYNN SCHOOL COMMITTEE, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF

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I. Clarification is needed on whether the Respondents' reading of *Grutter* conflicts with other decisions disapproving the use of racial classifications designed to maintain racial diversity/racial balancing.

The *Respondents' Brief in Opposition to the Petition for Writ of Certiorari* typifies the effort by some to stretch this Court's decision in *Grutter* v. *Bollinger*, 539 U.S. 306 (2003), to permit the use of racial classifications in order to maintain racial balancing. The Respondents insist:

> The Grutter Court did not recognize only viewpoint diversity or "true educational diversity" as a compelling interest, as Petitioners argue, Pet. Br. 12; rather, the Grutter Court also recognized racial diversity in public education as a compelling interest.

Opposition Brief, p.10. The First Circuit's decision adopts this expansive view. But this reading of *Grutter* is both inconsistent with that decision ("The [law school] policy does not define diversity 'solely in terms of racial and ethnic status'" *Grutter*, 539 U.S. at 316) and contradicts this Court's earlier decisions concerning racial balancing.

In *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.* this Court held:

> If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse.

402 U.S. 1, 24 (1971). Racial diversity is inappropriate because "the first remedial responsibility of school authorities is to eliminate invidious racial distinctions." *Id.* at 18. Racial diversity perpetuates racial distinctions, rather than eliminating them because children are taught that race dictates how they be treated, rather than their individual needs or characteristics.

After holding that perpetual racial balancing would exceed even the remedial power of the courts, this Court explained: "Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race." 402 U.S. at 23. Regardless of how "pupil of a racial minority" is defined, children are excluded from certain Lynn schools because of their race. This is true whether "racial minority" is defined numerically (children classified as "white" make up only 38% of Lynn's student population) or using the Plan's definition of "minority" (Black/African-American, Asian, Hispanic, or Native American).

The impact of expanding *Grutter* so as to reverse the general prohibition against assigning children by skin color cannot be overstated. Racial diversity, as a compelling interest, would not be limited to school systems that have identified some particular constitutional failing that needs to be remedied through the temporary use of a racial classification. This interest is so expansive as to permit the virtually limitless use of race-based assignments in public schools. If maintaining racial diversity justifies the inflexible mechanical use of race-based assignment processes, as held in the present case, then it is hard to conceive of any public school system across the country that would not be free to assign students race.

II. The Lynn Plan uses a racial quota.

While Lynn attempts to portray its student assignment plan as merely "race conscious" rather than race-preferential, the Respondents admit "[a] student's race is considered and used as a decisive factor" when a parent seeks to have their child participate in Lynn's school choice program. *Opposition Brief*, p.2. While Lynn's racial restrictions discriminate equally against all races, the fact is that at some of Lynn's schools, children classified as "minorities" are not permitted transfers, and

at other schools, children classified as "non-minorities" are not permitted transfers. *En Banc Opinion*, App.7-8. This is not merely being conscious of race; Lynn denies participation in school choice based on skin color. *See e.g. Stipulation of Fact No. 44* (because of the Plan's racial restrictions "Minority students attending the Lynn Woods elementary school . . . did not have the option of an out-of-district assignment (unless to unite siblings or extreme hardship could be demonstrated)").

The +/-15% variance used by Lynn is a quota. It insulates children from comparison with children who belong to the disfavored race for a particular school. *Grutter*, 539 U.S. at 334 (quotas "insulat[e] . . . applicants with certain desired qualifications from competition with all other applicants"). The quota may change from year to year, but for each school there is a desired racial percentage. If a child's assignment will be contrary to that racial percentage, it will be rejected. This is a quota.

III. The Respondents take contradictory positions on the applicability of *Grutter*.

The Respondents shift between arguing on the one hand that *Grutter* applies to the Lynn Plan – in an effort to justify the conclusion that diversity measured by race alone is a compelling interest – to arguing on the other hand that *Grutter* does not apply because Lynn's interest is not the same as the viewpoint diversity interest approved in *Grutter* – in an effort to avoid *Grutter*'s narrow tailoring analysis.

> Where viewpoint diversity is the educational institution's goal, as in Grutter, . . . it makes sense to require an individualized, holistic assessment of candidates to determine how each may contribute to the overall educational or viewpoint diversity on campus. Lynn's interest, however, is not to achieve the benefits of viewpoint diversity.

Opposition Brief, p.12. The justification for racial diversity cannot be found in *Grutter*, which explicitly did

not adopt diversity measured by race alone as a compelling interest. *Grutter*, 539 U.S. at 336 ("each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application"). While *Grutter* does not support the racial diversity interest adopted by the First Circuit, the basic requirements of narrow tailoring applied in *Grutter* are applicable to all racial classifications. Despite this, the Respondents argue that these fundamental requirements of narrow tailoring are not applicable to racial diversity.

IV. Individualized Consideration

A. The individualized consideration test for narrow tailoring is not uniquely applicable to higher education or viewpoint diversity.

The Respondents mistakenly view individualized consideration as a unique feature added to the narrow tailoring analysis in *Grutter* and only applicable in like cases. This ignores this Court's previous application of the requirement in other settings unrelated to viewpoint diversity. Individualized consideration ensures the longstanding requirements that racial classifications be applied in a flexible manner and in a way that minimizes their impact. *United States* v. *Paradise*, 48 U.S. 149, 171 (1987). This requirement has been applied in cases wholly distinguishable from the discussion of viewpoint diversity of *Grutter*.

In *City of Richmond* v. *Croson*, 488 U.S. 469, 507-08 (1989), this Court rejected the use of a ridged numerical quota where individualized consideration of applicants could have been used to determine which businesses has been disadvantaged by prior discrimination. Again in *Adarand Constructors* v. *Peña*, 515 U.S. 200, 207, 238 (1995), this Court used individualized consideration as a measure of narrow tailoring when reviewing a policy that presumed that all minority owned businesses are socially and economically disadvantaged.

Requiring individualized consideration in contract set-aside cases is not intended to ensure a diversity of viewpoints among contractors. Individualized consideration is required to ensure flexible application of racial classifications and to minimize their impact on third parties – *i.e.* it ensures that race is used narrowly.

This requirement is all the more appropriate given that the Equal Protection Clause "protect[s] *persons*, not *groups*." *Grutter*, 539 U.S. at 326, *quoting*, *Adarand*, 515 U.S. at 227 (emphasis in original). When a racial classification does not include individualized consideration, it can only be based on consideration of the group at the expense of the individual. The testimony of Lynn's expert typifies this view:

> [I]n the name of trying to protect individual rights, you often destroy the benefit that everybody wants in common and the viability for community in serious ways. And so, in all public policy issues, there are these kinds of decisions that have to be made about individual and community rights and possibilities.

Trial Transcript, Day 4, 117:13-18 (Dr. Orfield). Such group-based decision-making is necessarily based on stereotyping in that it assumes that predominantly minority schools are inherently inferior or that minority children cannot learn and develop without sufficient exposure to white children.

> After all, if separation itself is a harm, and if integration therefore is the only way that blacks can receive a proper education, then there must be something inferior about blacks. Under this theory, segregation injures blacks because blacks, when left on their own, cannot achieve.

Missouri v. *Jenkins*, 515 U.S. 70, 122 (1995) (Thomas, J., concurring).

B. Racial diversity is incompatible with individualized consideration.

When the goal is nothing more than racial diversity (*i.e.*, racial balancing) for its own sake, examination of the individual child loses much of its value as a tool for minimizing the impact of the racial classification. But that is only if you first adopt the idea that exposing our youngest citizens to racial classifications is a compelling interest; that it is permissible and even beneficial for government to view children as nothing more than members of a race and not as individuals with individual characteristics that are not dictated by skin color. It also requires ignoring this Court's previous admonitions against racial balancing for its own sake. *Freeman* v. *Pitts*, 503 U.S. 467, 494 (1992); *Grutter*, 539 U.S. at 330 ("outright racial balancing [] is patently unconstitutional"); *Swann*, 402 U.S. at 24 ("that approach would be disapproved and we would be obliged to reverse"). But, if the objective is an educational one, then examining how a child will or will not contribute to that interest is necessary in order to avoid the trap of racial stereotypes and to narrow the impact of the racial quota.

Respondents argue that individualized examination of Lynn's students is not necessary because, in their view, it is beneficial that Lynn evaluates its students based on nothing but their race. But this is the fatal flaw of racial diversity. Individualized consideration is incompatible with racial diversity because racial diversity is inherently incompatible with the Equal Protection Clause, which is designed to protect against government distinguishing between citizens based on nothing more than their race.

The purpose of the individualized consideration requirement is to ensure that government does not choose between individuals based on nothing more than the color of their skin. For example, in *Adarand* and *Croson* it ensured that the benefits of a remedial contract preference (had one been properly established) would not be distributed solely on race. Individualized consideration

ensures that such a remedial benefit would only be distributed to those who had been victims of discrimination within the relevant industry. *Adarand*, 515 U.S. at 207, 238; *Croson*, 488 U.S. at 507-08. In *Grutter*, the individualized consideration requirement prevented the law school from selecting applicants simply for belonging to the right race and required that they be selected based on how they would contribute to viewpoint diversity. *Grutter*, 539 U.S. at 316.

Under a racial diversity compelling interest, individualized consideration cannot fulfill this role because maintaining racial diversity requires doing exactly what narrow tailoring is meant to prevent – selecting individuals based on nothing more than the color of their skin. App.25 ("the Lynn Plan is designed to achieve racial diversity rather than viewpoint diversity. The only relevant criterion, then, is a student's race").

C. None of the factors listed by Lynn in their Opposition consider an individual child's effect on the classroom environment or act to minimize the impact of the racial quota.

The Respondents unpersuasively attempt to claim that the Plan does provide for some individualized consideration. But, the only considerations in denying a transfer request are class size and race. *En Banc Opinion*, App.7-8. The Respondents creatively argue:

> [B]efore race is used in a transfer decision, Lynn accounts for a number of individualized, race-neutral factors, including a student's place of residence, school attendance zones, a sibling's school assignment, whether a "neutral transfer" applies, class size, space availability, and the student's language or special education needs.

Even a cursory review of these "individualized, race-neutral factors" reveal this argument to be nonsense. The only factors that take into consideration the individual child are the student's language or special education

needs. Since the Lynn Plan only applies to regular education students, these factors merely determine if the child will be assigned to a bilingual or special education program. App.125 n.35 ("The Lynn Plan does not apply to school assignments for students participating in bilingual or special education programs").

The remaining factors do not examine the child's individual characteristics. Place of residence and school attendance zone simply go to whether the assignment sought would be a transfer request or would be considered the child's neighborhood school. Class size and space availability determines if there is a seat available for the child to request a transfer into. If there is an available seat and it is at a school that is not the child's neighborhood school, race alone will dictate whether or not the transfer will be granted.

The Respondents also list as a race neutral factor: "whether a 'neutral transfer' applies." This factor is not at all race-neutral. A neutral transfer is defined by race. It is a transfer between two schools that both fall within the +/- 10 or 15% proportional representation goal of the Plan. *En Banc Opinion*, App.7.

None of these factors are considered along with race in determining if an assignment will be granted. Race is a stand-alone determinative factor. The most important thing about these "individualized factors" is that they in no way examine how a child will, or will not, contribute to the claimed educational objective of the Plan. Other than demonstrating an extreme hardship (such as uniting siblings or medical or safety concerns (App.128)), there is simply no way for a child to overcome his or her race.

V. Lynn admits to the existence of at least one effective race neutral alternative.

The Respondents admit that "Lynn's three high schools have remained integrated without the [Plan's race-based] transfer restrictions." *Opposition Brief*, p.3. Lynn's high schools each fall within the racial quota of

+/-10% of the system-wide minority population; making transfers between the high school "neutral transfers" and not subject to the Plan's racial barriers. The three high schools achieve the proportional representation sought by the Lynn Plan by drawing from larger assignment zones coupled with the use of school choice ***without*** racial restrictions – demonstrating that Lynn's schools are capable of maintaining integration without the Plan's racial restrictions and that that the racial barriers are not the lest race restrictive alternative available.

VI. As acknowledged by all five judges of the First Circuit's *En Banc* Panel, their decision is not based on settled law.

The Respondents repeat, almost as a mantra, that the First Circuit's decision is based on "settled law." But the First Circuit itself disagrees with this assessment. *En Banc Opinion*, App.23 ("the Supreme Court has not yet considered a constitutional challenge to a voluntary race-based transfer policy for elementary and secondary schools" (majority opinion)); App.43 ("[t]he Lynn plan at issue in this case is fundamentally different from almost anything that the Supreme Court has previously addressed" (Boudin, C.J., concurring)); App.46 ("There is neither a Supreme Court decision squarely addressing whether racial diversity alone may constitute a compelling interest sufficient to justify the government's race-conscious preferences nor one addressing the narrow tailoring of racial classifications in voluntary, non-competitive school transfer plans" (Selya, J., dissenting)).

There is nothing settled about the question of whether public schools can assign children by skin color in order to maintain perpetual racial balance. *See*, *Freeman*, *supra*; *Swann*, *supra*. Because there are no cases directly on point, the circuit courts that have reviewed racial diversity assignment plans are sharply divided in their conclusions. *Compare*, *Eisenberg* v. *Montgomery County Public Schools*, 197 F.3d 123 (4th Cir. 1999), *cert. denied*,

529 U.S. 1019 (2000) (striking down a non-remedial racial balancing assignment plan); *Tuttle* v. *Arlington County School Board*, 195 F.3d 698 (4th Cir. 1999) (same); *Cavalier* v. *Caddo Parish School Board*, 403 F.3d 246 (5th Cir. 2005) (striking down racial balancing plan); *Doe* v. *Kamehameha Schools*, 416 F.3d 1029 (9th Cir. 2005) (finding that the mechanical inflexible use of race in school assignments violated 42 U.S.C. §1981) with *Brewer* v. *W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738 (2nd Cir. 2000) (finding that racial diversity might be a compelling interest and remanding for findings on narrow tailoring); *McFarland* v. *Jefferson County Brd. of Educ.*, 416 F.3d 513 (6th Cir. 2005) (finding racial diversity to be compelling, but finding inflexible plan that lacked individualized consideration to be insufficiently narrowly tailored); *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 426 F.3d 1162 (9th Cir. 2005) (finding racial diversity to be compelling and finding inflexible plan that lacked individualized consideration to be sufficiently narrowly tailored); *Comfort*, App. 18-19 (finding diversity measured by race alone as a compelling interest and that an mechanically applied racial classification, which lacks individualized consideration to be narrowly tailored).

CONCLUSION

For each of these reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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